CAPTAIN RUDOLPH ADRAIN JOSEPH

v.

MALAYSIAN AIRLINE SYSTEM BHD & ANOR; CIMB BANK BHD (GARNISHEE) (NO 2)

HIGH COURT SABAH & SARAWAK, KUCHING
ABDUL AZIZ RAHIM J
[SUIT NO: 22-86-2007-II]
21 JANUARY 2008

CIVIL PROCEDURE: *Execution - Stay - Garnishee order - Grounds - Special circumstances - Variation in consent judgment - Whether court functus officio - Jurisdiction to grant reinstatement or damages at common law - Whether there was compliance with consent judgments - Preservation of property or subject matter pending disposal of appeal - Justice of case - Balance of convenience*

This was an application ('encl. 73') by the 1st defendant seeking an order for a stay of execution of proceedings to enforce a Garnishee Order Absolute dated 11 January 2008 ('order') pending the disposal of the 1st defendant's appeal against the order. Of relevance to this case were two consent judgments agreed to between the parties (the 1st consent judgment and the 2nd consent judgment respectively) and an earlier application by the plaintiff ('encl. 23'). The issues raised by the 1st defendant were as follows: (i) the 2nd consent judgment contained new or additional or alternative orders, which should not be the case as the 1st consent judgment had been drawn up and perfected. It was submitted that the plaintiff's application in encl. 23 was in fact an application for variation of the 1st consent judgment, and that there was no jurisdiction for such application as the court was *functus officio* after making the 1st consent order; (ii) there was very limited jurisdiction to grant reinstatement or damages at common law. It was averred that if the plaintiff had been wrongfully dismissed and he had sued in damages at common law, then the quantum would be limited to the pay which would have been earned by the plaintiff had the proper period of notice been given; (iii) the compliance with the 1st and 2nd consent judgments; (iv) the preservation of property or subject matter pending the disposal of the 1st defendant's appeal; and (v) the justice of the case and the balance of convenience.

Held (dismissing the application):

(1) In regard to issue (i), the court was *functus officio* after making the 1st consent order and such order could not be varied or altered except for limited purposes under the slip rule. However, that principle only applies in cases where one party to the order or judgment opposes any application to amend or alter the order or judgment by another party. But in cases where all parties agree to the variation of the order, the court is not prevented from exercising its inherent jurisdiction to resolve the dispute between the parties by allowing them to alter the order. In the instant case, the 1st defendant had consented to the variation (as alleged by the 1st defendant) or deemed to have consented to it because the 1st defendant neither objected to the application nor filed any affidavit to oppose it. In respect of issue (ii), it was too late in the day for the 1st defendant to raise this argument to oppose the 1st or 2nd consent judgment. This argument should have been raised the first time in the plaintiff's earlier application in encls. 3 and 8 when it came up for hearing or when the plaintiff filed its summons in chambers in encl. 23. At this point, the 1st defendant already agreed to the reinstatement of the plaintiff on the terms stated in the two consent judgments and also agreed to the alternative order as to the payment of backwages in the event the 1st defendant failed to comply with the terms of the judgments as to the resinstatement. As for issue (iii), there was no compliance with the consent judgments by the 1st defendant despite the fact that there had been discussions between the plaintiff and 1st defendant as to how the offer letter to the plaintiff should be drawn up to incorporate the terms of the consent order after the plaintiff had obtained the 2nd consent judgment. There was, on the facts, no merit to issue (iv). With regard to issue (v), it was pertinent to note that the plaintiff's prayer in Order (6) of the consent judgment was in the alternative: that is either the 1st defendant re-employed the plaintiff on the terms agreed in the consent judgment, the reinstatement of whom the 1st defendant had agreed to, or the 1st defendant may, instead of re-employing the plaintiff, pay the backwages, which also had been agreed to by the 1st defendant. The choice or the exercise of the option was clearly on the 1st defendant's part. From the conduct and actions of the 1st defendant in this instance, it appeared that the 1st defendant was reluctant

to re-employ the plaintiff (whose reinstatement the 1st defendant had agreed to) on the agreed terms of the consent judgment. (paras 12, 13, 14, 15 & 16)

Case(s) referred to:

Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd [2004] 4 CLJ 232 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***

J & C New Poly Catering Sdn Bhd v. TTMP Bakun Consortium Sdn Bhd (Malayan Banking Bhd, Garnishee & Anor) [2005] 4 CLJ 838 HC ***(dist)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Penang Port Commission v. Kanawangi Seperumaniam [1997] 1 CLJ 423 CA ***(dist)***

Legislation referred to:

Courts of Judicature Act 1964, s. 57

For the plaintiff - Shankar RP Asnani (Francis Teron with him); M/s Thomas, Shankar Ram & Co

For the 1st & 2nd defendants - Jubilant Austinway (Sim Hui Chuang & Lim Lip Sze with him); M/s Zaid Ibrahim & Co

For the garnishee - Azrin Ahmat; M/s Idris & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Rahim J:

[1] This is the 1st defendant's appeal against my decision in encl. 73 dismissing the 1st defendant's application for stay of execution and restraining order pending appeal to Court of Appeal against my decision in encl. 43.

[2] The background facts (encl. 73) are as stated in my grounds of judgment in respect of encl. 43.

[3] After hearing counsels and having read the written submissions by counsels on encl. 73, I decided to dismiss the application and refused to grant stay or restraining order to the 1st defendant.

[4] I now gave my reasons for that decision.

[5] As I have said earlier, in its application in encl. 73, the 1st defendant is seeking an order for stay of all execution of proceedings to enforce the Garnishee Order Absolute dated 11 January 2008 pending the disposal of the 1st defendant's appeal against the Garnishee Order Absolute. Further and in the alternative the 1st defendant is seeking an interim injunction order be granted against the plaintiff/judgment creditor from dissipating or dealing with the garnishment sum paid by the garnishee on 14 January 2008 pursuant to the Garnishee Order Absolute. And further and in alternative the 1st defendant is also seeking a mandatory injunction order be granted against the plaintiff/judgment creditor to compel him to return the garnishment sum he received from the garnishee pursuant to the Garnishee Order Absolute within seven days of the order.

[6] The grounds stated in the 1st defendant's application for the stay and injunctive reliefs are: Firstly the 1st defendant has filed an appeal in the Court of Appeal against the Garnishee Order Absolute. Secondly, the plaintiff/judgment creditor is unemployed and does not have a source of income. Thirdly, there is a real danger that the money paid to the plaintiff/judgment creditor will be dissipated and the plaintiff would not be able to reimburse the same to the 1st defendant in the event the 1st defendant succeeds in the appeal. Fourthly, the money needs to be preserved and protected from being dissipated or utilized pending the disposal of the appeal. Fifthly, the 1st defendant has a strong and stable financial standing and is able to satisfy any judgment or order of the court given in favour of the plaintiff. Sixthly, there are special circumstances that exist to justify the grant of the stay order of execution and justice of the case tips in favour of granting the reliefs sought by the 1st defendant.

[7] The plaintiff, opposed the 1st defendant's application in encl. 73 and had filed affidavit in opposition.

[8] Before I proceed further, it should be placed on record that at the hearing of encl. 73, learned counsel for the 1st defendant conceded that the 1st defendant did not file any affidavit in reply to oppose plaintiff's affidavit in opposition. However learned counsel intimated to the court that despite that, the 1st defendant for the purpose of encl. 73 denied, and did not accept, everything that was said or asserted in the plaintiff's affidavit in opposition.

[9] I now return to the 1st defendant's application in encl. 73. Learned counsel for the 1st defendant submitted written submission dated 21 January 2008.

[10] The law as to stay of proceeding or execution is too well known to require any citation of any authorities. The law may be briefly stated that the filing of an appeal is not a ground for the granting of the stay: s. 57 of the Courts of Judicature Act 1964. The applicant must show special circumstances and that special circumstances must relate to the enforcement of the judgment: *Kosma Palm Oil Mill Sdn Bhd & 4 Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 and *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380.

[11] In arguing special circumstances in this instant application learned counsel for the 1st defendant pointed out that the 2nd consent judgment contains new or additional or alternative orders, in particular order (6) for the payment of backwages until 2012. He submitted that this should not be the case as the 1st consent judgment had been drawn up and perfected; and in the 1st consent judgment there is no order or judgment for backwages for the entire period of contract up to 2012. Also he said such order entitled the plaintiff to full wages for the next five years (until 26 January 2012) without having to work for it. It was submitted that the plaintiff's application in encl. 23 though couched as enforcement of judgment was in fact an application for variation of the 1st consent judgment. Learned counsel submitted that such application ought not to be made. There is no jurisdiction for such application. Citing the Federal Court case of *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143, learned counsel argued that the Court was *functus officio* after the 1st consent judgment. He submits that *Hock Hua Bank Bhd (supra)* was followed by the Court of Appeal in *Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd* [2004] 4 CLJ 232.

[12] On the legal principle as to *functus officio*, I agree with the learned counsel for the 1st defendant that the court is *functus officio* after making the 1st consent order and such order cannot be varied or altered except for limited purpose under the slip rule. However in my view that principle applies only in cases where one party to the order or judgment opposes any application to amend or alter the judgment or order by the other party. But in cases where all parties agree or consented to the order to be altered or

varied I do not think that the court is prevented from exercising its inherent jurisdiction to resolve the disagreement or dispute between the parties by allowing the parties to alter or amend the order. In *Zainuddin Muhammad (supra)* the Court of Appeal held that 'It is trite law that a consent order cannot be varied unless with the agreement of the other party or parties affected by it. Neither can it be set aside unless the conditions are met'. And in *Visia Finance Bhd (supra)* the Court of Appeal also held that 'an order made by consent in the absence of fraud, can only be varied by consent ...' Therefore I do not agree with the learned counsel for the 1st defendant's submission that the 1st consent judgment cannot be varied if the parties to it have agreed to the variation. In this instant case, the 1st defendant had consented to the variation (as alleged by the 1st defendant) or deemed to have consented to it because the 1st defendant did not object to the application or filed any affidavit in opposition to oppose it.

[13] The next argument by the learned counsel for the 1st defendant to persuade the court that there is special circumstances in this instant application is that there is very limited jurisdiction to grant reinstatement or damages at common law. It was argued that if the plaintiff had been wrongfully dismissed and the plaintiff had sued in damages at common law then the quantum is limited to the pay which would have been earned by the plaintiff had the proper period of notice been given. In my opinion it is too late in the day for the 1st defendant to raise this argument to oppose the 1st or the 2nd consent judgment. This argument ought to have been raised the first time in the plaintiff's application in encls. 3 and 8 when it came up for hearing or when the plaintiff filed its summons in chambers in encl. 23. However at this point, the 1st defendant already agreed to the reinstatement of the plaintiff on the terms stated in the two consent judgments and have also agreed to the alternative order as to the payment of backwages in the event the 1st defendant failed to comply with the terms of the judgments as to the reinstatement.

[14] As to the compliance with the 1st and 2nd consent judgments by the 1st defendant, I am satisfied that there was no compliance despite the fact that there has been discussions between the plaintiff's counsel and the 1st defendant's advocates as to how the offer letter to the plaintiff should be drawn up to incorporate the terms of the consent order, after the plaintiff had obtained the

2nd consent judgment. There were three points of compliance which the 1st defendant must comply to satisfy the judgment. The first is that the letter of offer by the 1st defendant under the two consent judgments must incorporate the terms as to the benefits and allowances (including salary payable) which the plaintiff was entitled to under the MAPA Agreement 2004-2007 and which agreement that 1st defendant had agreed being binding on it. Second, the letter of offer must be sent directly to the plaintiff. Thirdly, the original letter of offer by the 1st defendant dated 4 October 2007 issued pursuant to the 1st consent order must be reissued to the plaintiff directly by the 1st defendant incorporating all the terms agreed in the consent judgment within seven days from the date of the 2nd consent judgment. The particulars of non compliance were disclosed in the plaintiff's affidavits in support of his application in encls. 23 and 43. The 1st defendant did not challenge the facts deposed in encl. 23 and the affidavits in support thereof. The 1st defendant therefore cannot now say that the facts or statements in the affidavits are not true or that it did not agree with them. In this regard I would say that order (6) in the 2nd consent judgment becomes final when the plaintiff has shown to the satisfaction of the court that the 1st defendant's failure to comply within the specific time provided in the order.

[15] With regard to the preservation of property or subject matter pending the disposal of the 1st defendant's appeal, I find no merits in the argument by the 1st defendant's counsel. The authorities cited by the 1st defendant's counsel to persuade the court on this point namely *J & C New Poly Catering Sdn Bhd v. TTMP Bakun Consortium Sdn Bhd (Malayan Banking Bhd, Garnishee & Anor)* [2005] 4 CLJ 838 and *Penang Port Commission v. Kanawangi s/o Seperumaniam* [1997] 1 CLJ 423 are distinguishable from this instant application on the facts. In those two cases no consent judgment is involved.

[16] As to the justice of the case and balance of convenience, it is pertinent to note that the plaintiff's prayer in order (6) of the consent judgment is in the alternative: that is either the 1st defendant reemploys the plaintiff on the terms agreed in the consent judgment, the reinstatement of whom the 1st defendant has agreed to, or the 1st defendant may instead of reemploying the plaintiff pays the backwages which also has been agreed to by the 1st defendant. The choice or the exercise of the option is clearly on the part of the 1st defendant. From the conduct and

A action of the 1st defendant in this instant case, it appears to me that the 1st defendant is reluctant to reemploy the plaintiff (whose reinstatement the 1st defendant had agreed to) on the agreed terms of the consent judgment. This reluctance on the part of the 1st defendant can be inferred from the 1st defendant's conduct in
B dilly dallying the offer letter to the plaintiff on the ground of technical interpretation of the terms contained in the MAPA Agreement 2004-2007 as to whether the plaintiff is being posted or being transferred to Miri on him being reinstated under the consent judgment.

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[17] For the above reasons I dismissed the 1st defendant's application in encl. 73 and refused to grant the orders prayed for with costs to the plaintiff.

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